BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Pay	)	
Telephone Reclassification	)	CC Docket No. 96-128
and Compensation Provisions	)	
of the Telecommunications Act	)	
of 1996	)	

COMMENTS OF THE MISSISSIPPI PUBLIC SERVICE COMMISSION ON SOUTHERN PUBLIC COMMUNICATIONS ASSOCIATION'S PETITION FOR A DECLARATORY RULING

INTRODUCTION AND SUMMARY

Under the FCC's rules of practice and procedure, 47 C.F.R. §§ 1.415, 1.419, the Mississippi Public Service Commission ("MPSC") hereby presents these comments in response to the Petition filed on November 9, 2004 by the Southern Public Communications Association ("SPCA"). The MPSC believes that the SPCA's petition should not be granted.

The SPCA is demanding relief that is illegal under applicable law: A refund for the years 1997 to 2003 would clearly violate the ban on retroactive ratemaking. In addition, it would violate the filed-rate doctrine, which not only allowed but required BellSouth Telecommunications, Inc. ("BellSouth") to set its rates according to the tariff that the MPSC itself approved in 1997. Moreover, the

SPCA's complaint – coming more than 6 years after the fact – was far outside any statute of limitations.

Not only does the SPCA's request violate Mississippi law, it is not appropriate for the Federal Communications Commission ("FCC") to resolve. The FCC is supposed to issue declaratory rulings only to "remove uncertainty." 5 U.S.C. § 554(e); 47 C.F.R. § 1.2. But no genuine uncertainty exists merely because different states might have different results. To the contrary, the MPSC has always been bound by and applied the FCC's standards, which the FCC itself directed the state commissions to implement. The mere fact that one party is now disgruntled – 7 years after the fact – does not create any rationale for the FCC to override the MPSC's determinations. The FCC should therefore deny the SPCA's petition.

BACKGROUND

On May 19, 1997, BellSouth filed a tariff for payphone services in Mississippi. The MPSC duly approved that tariff with an effective date of April 15, 1997. *See* Order, *BellSouth Telecommunications, Inc., Notice of Tariff Filing for Flat Rate Option(s) Customer Provided Public Telephone and Smartline Service for Public Telephones*, Docket 97-UN-0302 (Miss. PSC 1997) ("*1997 Mississippi Order*"). At no time – whether in 1997 or in the six years

since – did any party produce evidence that BellSouth's tariff failed to comply with the FCC's orders as to the "new services test."

Thus, all the relevant parties in Mississippi complied with that BellSouth tariff for some six-and-a-half years. On October 1, 2003, BellSouth itself reached a settlement with SPCA agreeing to lower that tariff. The SPCA nevertheless decided to demand refunds of amounts paid back to 1997.

The SPCA therefore filed a complaint with the MPSC in December of 2003. The SPCA sought two aspects of relief: (a) A refund of the federally-tariffed end-user common line change ("EUCL") and subscriber line charge ("SLC") paid from April 15, 1997 through October 1, 2003; and (b) a refund of all amounts paid for intrastate pay telephone access service ("PTAS") that was an "overcharge." *2004 Mississippi Order* at 1.[1]

The MPSC denied the SPCA's complaint. The MPSC noted that it had expressly approved BellSouth's 1997 tariff, and that the 1997 order was "never appealed or contested by any

[1] *See* Order, *In re: Complaint of the Southern Public Communications Association for Refund of Excess Charges by BellSouth Telecommunications Inc. Pursuant to its Rates for Payphone Line Access, usage, and Features*, Docket No. 2003-AD-927 (MPSC Sept. 1, 2004) ("*2004 Mississippi Order*") (attached to SPCA's petition as Exhibit A).

party, despite the fact that SPCA's predecessor entity . . . was a party to that proceeding and had been furnished with the proprietary cost studies and underlying cost data filed by BellSouth in support of its PTAS rates as being in compliance with the FCC's 'new services test.'" *Id.* The MPSC also noted that we simply could not grant a refund that would violate both the prohibition against retroactive ratemaking and the filed rate doctrine. *Id.* at 4 (citing *United Gas Corp. v. Mississippi Public Service Commission*, 127 So.2d 1355 (Miss. 1988) and *United Gas Pipe Line Co. v. Wilmut Gas & Oil Co.*, 97 So.2d 530 (Miss. 1957)).

The SPCA attempted to rely on the same sort of federal preemption arguments that it brings here. The SPCA argued, for example, that the FCC's 2002 *Wisconsin Order* preempted our 1997 approval of BellSouth's tariffed rates. The MPSC held that this claim "cannot even withstand scrutiny," noting that the FCC itself had observed that there would be "disparate applications of the new services test in various state proceedings." The Order also pointed out that there is no language in the *Wisconsin Order* discussing either the issuance of refunds that could have any preemptive effect. *Id.* SPCA provided no support whatsoever for its claim that BellSouth was "under a continuing duty to revise its rates." *Id.*

As a final bar to SPCA's complaint, the MPSC held that the SPCA's claim had expired under all relevant statutes of limitations. While SPCA had provided citations to state commission orders from other states, all of those orders "were issued after this Commission's July 1997 Order." *Id.* at 5. SPCA could have filed a complaint based on those decisions at some point in the intervening years, but it did not do so. *Id.* Thus, "SPCA's failure to file its complaint until some six (6) years after this Commission approved BellSouth's PTAS tariff bars its Complaint under both federal and state statutes of limitation." *Id.* The MPSC therefore found that SPCA did not "demonstrate any legal basis that justifies the relief it requests." *Id.*

SPCA filed an appeal in the Chancery Court of the First Judicial District of Hinds County, Mississippi. After filing its appeal, the MPSC, in conjunction with BellSouth, filed a motion to remove that case to the United States District Court for the Southern District of Mississippi. That case is still pending in federal court.

ARGUMENT

I. The MPSC Properly Applied Governing Law

Contrary to the SPCA's suggestion, the MPSC has never questioned that the FCC's "new services test" provides the standard governing BellSouth's PTAS rates. There is

nevertheless no basis for the claim that members of the SPCA may bring a complaint in 2003 demanding refunds of charges paid under a tariff approved in 1997.

In the first place, while the SPCA complains that the MPSC approved BellSouth's tariff in 1997 without conducting a hearing, SPCA Pet'n at 7, it ignores two central and decisive facts about that 1997 order: (1) While a payphone service provider ("PSP") organization tried to argue that BellSouth had failed to meet the "new services test," the MPSC specifically found that BellSouth "did, however, file cost data in support of its tariff filing." *1997 Mississippi Order* at 3. Then, (2) the MPSC specifically invited that PSP organization to "assist[] the Commission" in applying the "new services test," *id.*, and ordered the parties to "consult with one another and submit a jointly proposed procedural schedule in this matter." *Id.* at 4. Yet, as the SPCA now admits, "neither a procedural schedule nor an evidentiary hearing were ever set in the case . . . ." SPCA Pet'n at 7. The PSPs thus failed to pursue any dispute that they might have had with BellSouth's rates. Nor did any PSP appeal or contest the 1997 order.

The SPCA claims that the MPSC should have held an "evidentiary hearing" in response to its 2003 Complaint because "as a matter of preemptive federal law," the "SPCA

had a right to pursue a cause of action in the MPSC for refunds for any period of time prior to the filing of the Complaint . . . ." SPCA Pet'n at 4. This argument – upon which the entire petition rests – is incorrect. Nothing in the FCC's orders purports to guarantee PSPs a refund from valid and unchallenged tariffed rates. Instead, federal law establishes a standard to govern payphone line rates and gives commissions like the MPSC responsibility for administering those standards under ordinary state procedures. Independent PSPs were not without remedies in 1997 if they believed that BellSouth's rates did not comply with federal law. But, having failed to pursue those remedies, they are barred from doing so at this time. The MPSC dismissed SPCA's complaint because, even assuming that BellSouth's 1997 tariff did not comply with the FCC's *Wisconsin Order*, the SPCA's only current remedy was prospective – establishment of new rates – and that relief had already been achieved.

In reaching that conclusion, the MSPC properly relied on state-law doctrines that forbid a refund here of charges paid under state tariffs. As a result of the ban on retroactive ratemaking, carriers cannot be forced to pay a refund for lawfully-filed tariffs. *See, e.g.*, *United Gas Corp. v. Mississippi Public Serv. Comm'n*, 127 So.2d 404

(Miss. 1961) ("[r]atemaking is prospective and not retroactive"). And by the filed-rate doctrine, all carriers and customers are legally bound to pay a lawfully filed rate. Indeed, these doctrines are not just matters of Mississippi law, but of federal law as well. *See, e.g.*, *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578 n.8 (1981) ("[T]he Commission may not impose a retroactive rate alteration and, in particular, may not order reparations . . . ."); *Louisville & Nashville R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915) ("[T]he rate of the carrier duly filed is the only lawful charge. Deviation from it is not permitted upon any pretext."). Courts have recognized "only two circumstances" in which a rate can be adjusted retroactively: "when parties have notice that a rate is tentative and may be later adjusted with retroactive effect, or when they have agreed to make a rate effective retroactively." *Consol. Edison Co. of N.Y., Inc. v. FERC*, 347 F.3d 964, 969 (D.C. Cir. 2003). Obviously, neither exception applies here, and the SPCA doesn't even attempt to claim as much.

Finally, even if the SPCA's claim had any merit, it was clearly barred by all applicable statutes of limitations. As we found, the SPCA had failed "to file its complaint until some six (6) years after this Commission

approved BellSouth's PTAS tariffs," and that this delay "bars its Complaint under both federal and state statutes of limitation." *2004 Mississippi Order* at 5. The SPCA does not refute or even attempt to address our holding in this regard.

II. This Commission Should Refrain From Providing SPCA Yet Another Bite at the Apple

The MPSC determined that SPCA could not lawfully seek any refunds for amounts paid under a valid state tariff. Its members could have challenged the 1997 tariff while it was in effect but chose not to do so. They filed a complaint, some six years later, with the MPSC. They are now appealing that judgment in federal court. And – in an apparent attempt to get a *fourth* bite at the apple – they are bringing the same claim to the FCC.

The MPSC notes that the legality of the 1997 tariff is not even before the FCC, since that tariff is no longer in effect. The basis for the denial of the SPCA's complaint was simply that – having acquiesced in the 1997 tariff for six-and-a-half years – SPCA's members had no legal basis for refunds, even if the 1997 tariff would not pass muster under current standards. Although the SPCA relies on a claim of federal preemption, it fails to acknowledge that the FCC specifically held that it would "rely on the states

to ensure that the basic payphone line is tariffed by the LECs in accordance with the requirements of Section 276." Order on Reconsideration, *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 21233, 21308, ¶ 163 (1996) ("*Order on Reconsideration*"). The FCC later made the same point again: "In the interest of federal-state comity, we stated that we would rely initially on state commissions to ensure that the rates, terms, and conditions applicable to the provision of basic payphone lines comply with the requirements of section 276." *In the Matter of Wisconsin Public Service Commission; Order Directing Filings*, 17 FCC Rcd 2051, 2056, ¶ 15 (2002).

The FCC has noted that "state commissions that are unable to review these tariffs may ask incumbent LECs operating in their states to file such tariffs with the Commission," *id.*, but that is not the case here: The MPSC is not (and has not been) "unable to review these tariffs," nor has the MPSC itself asked incumbent LECs to file any tariffs with the FCC. Far from it: the MPSC *did* review the 1997 PTAS tariff that BellSouth filed, including the "cost data" in support of it. *1997 Mississippi Order* at 3. Furthermore, BellSouth has, under the MPSC's auspices,

revised its tariff, and the SPCA had no complaint about that. The FCC has never suggested that its regulations preempt laws governing the remedies available for the enforcement of the federal pricing standard. The MPSC properly applied those laws; in any event, any challenge to that application is for the reviewing court.

CONCLUSION

For all the above reasons, the FCC should deny the SPCA's petition.

Respectfully submitted,

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